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SUBJECT: TRIPS COUNCIL, CHINA TRM, OCTOBER 25, 2005

1.(U) Summary. At the fourth annual Trade Review Mechanism (TRM) on China's intellectual property (IP) regime at the WTO, the United States, Japan and the European Union submitted, collectively, their most extensive questions to the China. In addition, the United States formally submitted its Article 63 request to China for further detail on China's IPR enforcement regime since 2001, with additional Article 63 requests also then expected from Switzerland and Japan. Notwithstanding this increased pressure, the Chinese delegation responded by rejecting many of the TRM questions as unrelated to China's TRIPS obligations, avoiding various challenging questions in their entirety, and initially rejecting the Article 63 request in a bilateral meeting as lacking specificity and not within the purview of Article 63 itself. China instead urged reliance on bilateral mechanisms rather than the WTO process. The WTO Secretariat will draft a factual report of China's review to the General Council in accordance with China's TRM, containing WTO Members' interventions and documentation. END SUMMARY

Background

12. (U) An interagency delegation led by Acting Assistant U.S. Trade Representative for Intellectual Property, Investment and Services Victoria Espinel, and including Assistant USTR General Counsel Stanford McCoy, USPTO Geneva and Beijing based IPR Attachés, Jon Santamauro and Mark Cohen, as well as USPTO Attorney Advisor Deborah Lashley Johnson and USDOC's Kristine Schlegel milch attend the fourth annual TRM of China at TRIPS Council. The USDEL also met with the Chinese delegation on October 25, 2005. The Chinese delegation was led by Shao Changfeng, Deputy Director, Notification and Policy Review Division, Department for WTO Affairs of MOFCOM. Rong Min, who works in Law and Treaties under Li Ling of the Ministry of Commerce led the legal discussions, as well as Ren Gang from the SAIC, Xu Chao from the National Copyright Administration, among others. Separate meetings were also held with the delegation of Japan.

China Shows Less Willingness to Cooperate in a Multilateral Environment

13. (U) At TRIPS Council, the Chinese head of delegation demonstrated a markedly less interest in engaging on IPR issues in comparison to past meetings. The delegation argued at TRIPS Council and in the later bilateral meeting that many of the issues being raised by the USDEL and others were outside of the scope of TRIPS, could be better handled in bilateral context, and that the scope of the information requested was typically at a level beyond the capability that even the inquiring countries could respond to if they had been asked the same questions. The potential precedential impact of the Chinese delegation's efforts to narrowed the scope of information that it would provide in the TRM compared to prior years and its ungenerous view of the scope of TRIPS were not positive, to say the least. Among the inquiries China rejected were that China: would not provide information on substantive IPR provisions in its Free Trade Agreements; would not provide information on limitations on scope of operations of non-governmental organizations in China; would not provide information on Internet copyright; would not publish its administrative decisions, including administrative enforcement decisions; and that China has no plans to amend its criminal code to address alleged TRIPS-inconsistencies. The Chinese delegation also asserted that

the relationship among market access, censorship and piracy were not TRIPS-relevant issues.

14. (SBU) In addition to the above, in some instances, China flatly misstated or confused relevant Chinese laws. Thus, China equated the legal requirements in its Trademark Law to protect geographical indications (GI's), including relevant implementing regulations, with a rule promulgated by China's Administration for Quality Supervision, Inspection and Quarantine; a rule has much less legal effect or significance than a law in China. China also advised that there are no plans to revise any IPR laws, when in fact a draft revision of the patent law has been discussed, and a revision to the Trademark Law is also expected to be revived for consideration by the National Peoples Congress. Moreover, the Chinese delegate in the discussion on implementing the Doha agreement regarding access to medicines advised that China is drafting implementing legislation for Doha, which could take the form of a revised law.

15. (SBU) China also advised that only Beijing and Shanghai have lists of foreign specially protected marks, when data suggests that other localities have developed or are contemplating such lists. China also suggested that rights holders can apply to have their brands included on these lists, when in fact the list in Beijing, at least, is closed. In the criminal IPR area, China misstated that arrest and investigation standards for IPR crimes can only be adopted by the National People's Congress, when in fact such local standards have been known to exist for some time and have been adopted in Shanghai and elsewhere.

Modest Improvements in China's IPR Regime Revealed by China

16. (U) China did advise that there has been no change in its policies towards licensing of investigative firms, that information regarding the national IPR strategy is available on a website, www.nipso.cn, and that freight forwarders may be held liable for exporting infringing goods under appropriate circumstances. Chinese Customs is drafting guidance with the Ministry of Public Security (MPS) on procedures with Customs procedures in international trade. Chinese delegates also said criminal penalties may be available for service mark infringement, and explained that the recent judicial interpretation on criminal IPR enforcement does not address the relationship between repeated administrative offenses and criminal liability. Two websites provide details on local efforts to improve trademark enforcement: www.baic.gov.cn and www.sgs.gov.cn, for Beijing and Shanghai, respectively. The compulsory license for textbooks applies to foreign and domestic textbooks, although China had not yet received any complaints about such efforts. No special protection is afforded to well known marks under the criminal law, although infringements of well known marks more easily cross the thresholds of criminality.

U.S. Highlights Continuing Challenges, While EU and Japan Express Dissatisfaction, Canada Expresses Weakly Worded Concerns

17. (U) The U.S. delegation separately delivered five additional questions to TRIPS Council for later response by China, as well as a statement which highlighted areas in which there had been improvements by China, as well as outlining underlying concerns. The U.S. statement in particular highlighted concerns about national treatment in enforcement, continued problems in squatting, including design squatting, the need for enhanced criminal deterrence, a continuing problem with lack of transparency in the Chinese system, and the importance of efficient enforcement measures to small and medium enterprises who are encountering infringement in China and who lack a physical presence in China.. The United States also expressed its concerns about low levels of enforcement action taken on behalf of foreign rights holders, as well as lack of transparency in the administrative system generally. The United States also noted that it believed that only a criminal justice system could adequately serve the need for effective deterrence in accordance with China's own legal development and the TRIPS Article 61 obligation to have criminal procedures and penalties.

18. (SBU) The Japanese delegation, relying upon METI's ?Field Survey for Infringement of Intellectual Property Right in China? completed on June 23, 2005 (available at: http://www.meti.go.jp/english/report/data/050_623ChinaIPR.html), advised TRIPS Council that ?there still exists significant problem in IP protection and enforcement in China.? In particular, application of administrative sanctions is not effective enough, and as a result repeated infringement is rampant. At least one half of Japanese companies which use remedial procedures also experienced repeated infringement and that Chinese IPR enforcement is insufficient to deter further infringements, the Japanese

delegation explained. Japan underscored the importance of enhanced criminal prosecution against IPR infringement. The Japanese delegation in a separate bilateral with USDEL advised that it had not received any complaints about famous brand issues in China, a subject of the USG TRM inquiry, and was interested in knowing further about this.

¶19. (U) The European Commission delegation advised that the Chinese response was ?not as comprehensive and detailed? as it would have hoped, and that it would like to see more questions answered. The EC noted some progress on IP enforcement in China but that, like other delegations, it remains ?highly concerned.? The EC noted in particular that it would continue to work bilaterally, building upon its mid-October IPR Working Group meeting in Beijing. (Note: Some recipients of this report also received (SBU) Beijing 17254, which provided a readout of that October 18 EU-China IPR Working Group meeting. Endnote.)

¶10. (U) Canada noted its concern about Chinese infringements of products affecting public health and safety, such as pharmaceuticals, and that it was pleased to host a recent Chinese delegation on Internet copyright matters.

¶11. (U) There were no interventions from any of the several countries currently negotiating Free Trade Agreements (FTAs) with China. As in last year?s TRM an IPR delegate from a North African country privately expressed his concerns over increased counterfeiting of trademarks from his country in China and their export back to his country. In addition, he noted that these marks were also being squatted upon in China. The scheduling of the TRM did not permit further extensive bilateral discussions with other missions.

Chinese Delegation Gets Defensive

¶12. (SBU) The Chinese delegation, in its closing comments, rejected many of the assertions made by many countries that China was responsible for much of the world trade in counterfeit goods. The Chinese delegation also pointed out that many of the challenges China faces are not unique to China, but are also being faced by many developed and developing countries. This official specifically pointed to a recent criminal case involving two Americans in Shanghai who were convicted of selling pirated DVD?s over the Internet (Operation Spring), as well as other cases suggesting international involvement in the trade of counterfeit and pirated goods. Comment: This was a long-anticipated first effort by China to use criminal justice cooperation with foreign countries to support its trade position in IPR and highlights the critical need for improved cooperation between trade and criminal justice authorities in the United States to ensure that criminal cases are prosecuted or presented that advance overall intellectual property and trade goals. End comment.

Bilateral Meeting: The First Legal Sparring Over TRIPS Article 63

¶13. (U) A separate bilateral meeting was held between the USG and China over outstanding bilateral issues. The meeting had originally been scheduled before the TRIPS Council session, but was ultimately postponed until after the TRM, perhaps to afford a further opportunity to the Chinese delegation to consider how to respond to the Article 63 request in a bilateral, rather than a multilateral context.

¶14. (U) The delegate from China leading this discussion was Rong Min, from the Law and Treaties Division of China?s Ministry of Commerce (MOFCOM). Mr. Rong advised that his government had not yet come to a final decision regarding how to respond to these requests. However, in his view, the US government?s Article 63.3 request was governed by TRIPS Article 63.1 which limited such requests to ?final judicial decisions and administrative rulings of general application,? made effective by a Member. As, in his view, China is not a common law country and lacks cases of precedential impact, he did not view Article 63.1 as applying to China. With regard to Article 63.3, the first sentence of 63.3 was clearly governed by Article 63.1, as it stated that WTO members shall ?supply, in response to a written request from another Member, information of the sort referred to in paragraph 1.? The second sentence of Article 63.3 was also not applicable, as it stated that ?A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.? Because, in Mr. Rong?s view, the USG had not identified specific decisions of concern but had asked for information regarding all cases, the request was

overly broad. Moreover, Mr. Rong also expressed his opinion that Article 63.3 was a one-side authorization. The USG may make such requests, however there was no corresponding Chinese obligation to respond. Mr. Rong suggested that a more appropriate legal basis would be Article 18 of China's Protocol of Accession to the WTO. Note: Article 18 provides the legal basis for the TRM itself. End note.14. The Chinese head of delegation however took pains to note in his final comments that the Chinese delegation would respond to the inquiry if it was in fact required under TRIPS and that it was willing to respond to many of the USG concerns outside of the WTO context.

¶15. (U) USTR General Counsel's Stan McCoy led the U.S. response. The U.S. advised that the reason that the request was being made was because the Chinese government had previously identified these decisions as important enough to distribute to TRIPS Council in statistical format. There is no indication in the second sentence of Article 63.3 that it should be governed by Article 63.1. The U.S. also advised that a one-sided view that members could pose questions without any corresponding obligation would render the second sentence of 63.3 ineffective, which certainly could not have been the drafters' intent. Finally, the US government was prepared to work with China to make the work manageable. Most importantly, Article 63 was intended to avoid disputes by providing a basis for a cooperative exchange of information.

¶16. (SBU) In a separate discussion after the bilateral meeting of delegations with the Beijing IPR Attach,, two Chinese IPR officials argued noted that the scope of the U.S. request is too broad for them to easily implement as there are simply too many IPR administrative enforcement cases. They would appreciate a narrower request on specific issues.

Comment

¶17. (SBU) Compared to last year's TRM, this year's TRM provided considerably less constructive information on developments in China's IPR system. China was also noticeably less willing to engage multilaterally on the relevant issues. It was too early to determine what impact, if any, the Article 63 request will have and how China will respond to it as well as the overall impact on these requests on bilateral dialogue, including Embassy Beijing's Ambassador's Roundtables on IPR protection in China in Beijing and Shanghai, the JCCT IPR Working Group meetings, and related efforts which will no doubt be the subject of separate cables from Beijing and Shanghai.
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